No. 91-1076

JAN 29 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LONG BEACH EQUITIES, INC.,
Petitioner,
vs.
COUNTY OF VENTURA, CALIFORNIA, and
CITY OF SIMI VALLEY, CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX

PETITIONER'S REPLY BRIEF

MICHAEL M. BERGER
of BERGER & NORTON
A Law Corporation
1620 26th Street
Suite 200 South
Santa Monica, CA 90404
(310) 449-1000

PAUL R. HAMILTON
Counsel of Record
KAREN J. LEE
of HAMILTON & SAMUELS
4000 MacArthur Boulevard
Suite 5700
Newport Beach, CA 92660
(714) 752-8600

Attorneys for Petitioner
LONG BEACH EQUITIES, INC.

Lawyers Brief Service • Appellate Brief Printers • (213) 383-4457 • (714) 720-1510

No. 91-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LONG BEACH EQUITIES, INC.,
Petitioner,
vs.
COUNTY OF VENTURA, CALIFORNIA, and CITY OF SIMI VALLEY, CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX

PETITIONER'S REPLY BRIEF

MICHAEL M. BERGER
of BERGER & NORTON
A Law Corporation
1620 26th Street
Suite 200 South
Santa Monica, CA 90404
(310) 449-1000

PAUL R. HAMILTON
Counsel of Record
KAREN J. LEE
of HAMILTON & SAMUELS
4000 MacArthur Boulevard
Suite 5700
Newport Beach, CA 92660
(714) 752-8600

Attorneys for Petitioner
LONG BEACH EQUITIES, INC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

INTRODUCTION 1

"*AD HOC*" DECISIONS REQUIRE FACTUAL ADJUDICATION BEFORE DECISION. 3

IPSE DIXIT IS NO WAY TO DETERMINE CONSTITUTIONAL RIGHTS 5

SUBSTANTIVE DUE PROCESS IS NOT A WORD GAME 6

THE IDEA OF "REASONABLE, INVESTMENT-BACKED EXPECTATIONS" FOUND IN THE CITY AND COUNTY BRIEFS ROBS THE CONCEPT OF ANY MEANING . . . 7

"RIPENESS" SHOULD NOT BE A GAME EITHER 9

CONCLUSION. 10

TABLE OF AUTHORITIES

Page

Cases

Hall v. City of Santa Barbara
(9th Cir. 1986) 813 F.2d 198 3

Lakeview Dev. Corp. v. City of
South Lake Tahoe
(9th Cir. 1990) 915 F.2d 1290 8

Lucas v. South Carolina Coastal Council
cert. granted, no. 91-453. 5

McDougal v. County of Imperial
(9th Cir. 1991) 942 F.2d 668. . . . . 1, 3

National Advertising Co. v. City of Raleigh
(4th Cir. 1991) 947 F.2d 1158 9

Nollan v. California Coastal Commn. (1987) 5
483 U.S. 825

Penn Central Transp. Co. v. City of
New York (1978)
438 U.S. 104. . . . . 3, 8

PFZ Properties, Inc. v. Rodriguez
cert. granted, no. 91-122. 6

Ruckelshaus v. Monsanto Co. (1984)
467 U.S. 986. 3

Yee v. City of Escondido
cert. granted, no. 90-1947 4

INTRODUCTION

The opposition briefs filed by the City of Simi Valley and the County of Ventura demonstrate the need for this Court's review. Although they succeeded in having LBE's case dismissed on the pleadings, thus precluding LBE from presenting any evidence to a trier of fact to determine what actually happened, both the City and the County briefs heavily stress the governmental version of the "facts" which occurred, as though there had been a trial and conflicting evidence had been weighed.[1]

But there has been no trial. There has been no full evidentiary presentation.[2] Under the rules applied by the California courts, there need not be. Disputed issues of the permitted and realistic uses of land, as well as the need for stringent governmental regulations, can be decided by the court — without evidence — as a matter of *law*. This is in stark contrast to other jurisdictions (the 9th Circuit Court of Appeals, for example [*McDougal v. County of Imperial* (9th Cir. 1991) 942 F.2d 668]) in which such issues can only be decided after trial, as questions of *fact*.

---

[1] Many of the so-called "facts" asserted in both the City and County briefs are disputed by LBE and would be contested by evidence if the case were allowed to get beyond the pleading stage. Because the important issues before *this* Court are issues of law, LBE will not seek to correct every disputed "fact" raised by the government agencies. That factual dispute demonstrates the need for trial, but resolution of the facts should be done in a forum far removed from this one.

[2] In an exercise in judicial myopia, the California courts took limited judicial notice of selected phrases from selected documents, and gave those phrases conclusive weight, even though other official City and County documents contained contradictory information. No testimonial evidence was received.

The essential facts (as alleged in the complaint) are simply that LBE had worked long and hard with both the County and the City to develop plans which were acceptable to the regulators, received assurances from the regulators that the project was acceptable, and then — after the expenditure of millions of dollars in reliance — the regulators decided to preclude development. Moreover, the complaint alleges that there was no rational justification for preventing development of LBE's property. LBE had cooperated with both the County and the City in planning the development of the entire area of which its property was a small part, had contributed money toward the construction of oversized utilities through neighboring properties in order to service the expected development of its own property, and purchased the property only after being assured that its development concepts were compatible with those of the County and City. The County, the City and LBE had agreed on a time frame for development which was immediate. To effectuate that, the County removed agricultural restrictions from the property so that it could be residentially developed. The complaint alleges that there were adequate facilities to service the LBE development without burdening either the County or the City. Thus, refusal to permit development was irrational, arbitrary, and capricious. Those facts show sufficient interference to warrant trial.

Both the City and the County make much of the fact that LBE did not seek annexation into the City. Of course not. After the City stopped processing the plans which LBE had prepared at great effort and expense, imposed a moratorium on development, and then placed a stringent limitation on the number of new homes to be constructed each year, why would anyone seeking to develop property seek admission to such a jurisdiction? Annexation would have guaranteed sterility. Thus, when it became clear that development in the City could not

economically take place, LBE sought development permission from the County, which refused even to process the paperwork, even though it had the responsibility for the LBE property as a matter of state law.

LBE seeks only the chance to present its case to a trier of fact. The problem is the absence of coherent rules establishing the elements which need to be pled for a property owner to get its case before a fact finder for decision. The absence of coherent rules allows anarchy to prevail in the lower courts, with the results on the same facts varying widely from state to state depending on the predilections of the individual judges. That's no way to protect constitutional rights.

"*AD HOC*" DECISIONS REQUIRE FACTUAL ADJUDICATION BEFORE DECISION

This Court has repeatedly held that there is no set formula for determining when a regulatory taking has occurred, but each case must be examined, *ad hoc*, on its own facts to determine the impact of the challenged regulation. (E.g., *Penn Central Transp. Co. v. City of New York* [1978] 438 U.S. 104, 124; *Ruckelshaus v. Monsanto Co.* [1984] 467 U.S. 986, 1005.)

An *ad hoc* determination would seem to be a singularly inappropriate place to permit decision-making **without a full evidentiary hearing** and as a matter of law. Yet that is what the California courts do, as exemplified by this case.

In sharp contrast, the 9th Circuit Court of Appeals (the federal appeals court with jurisdiction over California) has repeatedly viewed regulatory taking cases as instances which require careful factual examination before decision. (E.g., *McDougal v. County of Imperial* [9th Cir. 1991] 942 F.2d 668, 680; *Hall v. City of Santa*

Barbara [9th Cir 1986] 813 F.2d 198, 201-202.)[3]

Rather than deal with this conflict in the law, the City and County merely recite what the California courts did below as though that application of one of the two conflicting viewpoints ends the matter. For example, the City headlined one of its sections as follows:

> "The State Courts examined the City and County regulations and found that they substantially advance legitimate state interests" (City opp., p. 8)

The County headlined one of its sections like this:

> "The County's guidelines for orderly development substantially advance a legitimate state interest and do not deny the economically viable use of Long Beach Equities' property" (County opp., p. 14)

LBE agrees that that is what the state courts did. The problem is that the state courts did it without trial and without evidence and without any ability to weigh the facts so that such determinations might properly be made.[4] Simply accepting, at face value and without

---

[3] This sharp contrast between California and the 9th Circuit is reminiscent of the dispute which brought *Yee v. City of Escondido, cert. granted*, no. 90-1947 to this Court.

[4] This is no mere academic concern. The City, for example, repeatedly says that it has zoned the subject property for 325 homes and asserts that such zoning could never result in a taking. There is an old addage in the real estate business: "You can set the price if I can set the terms." The reason for that is that the terms (e.g., calling for payment spread over 100 years) are critically important. So, here, for the City to base its argument *solely* on the number of units theoretically available for the subject property — without regard to the *timing* of that development, which the City has rigidly circumscribed — provides *no* information from which to reach a conclusion as to whether a taking has occurred.

evidentiary examination, the City and County rationalizations for their actions, and concluding that no taking can occur because the actions were undertaken for "proper" purposes, is no more acceptable here than it is in *Lucas v. South Carolina Coastal Council, cert. granted*, no. 91-453.

By this type of sleight-of-hand, the government entities have borne out this Court's expressed concern about the ". . . cleverness and imagination . . ." of governmental word games which could result in the regulatory confiscation of private property (*Nollan v. California Coastal Commn.* (1978) 483 U.S. 825, 841).

Clear guidance from this Court is needed so that decisions based on the actual facts are rendered on constitutional issues.

IPSE DIXIT IS NO WAY TO DETERMINE CONSTITUTIONAL RIGHTS

Because of its need to defend the California system of deciding regulatory taking cases as a matter of law, without factual examination, the City is reduced to global pronouncements and *ipse dixit*.

For example, the City notes the state court assertions that the ordinances do not automatically preclude development and that, if LBE had its property annexed to the City "it could explore other possibilities . . ." (City opp., p. 10) Please note that these assertions do not relate to the way in which the ordinances have been applied so as to preclude economically viable development of the LBE property.

From these assertions, the City leaps to the unsupported conclusion that "Interesting questions as to the precise meaning of 'reasonable investment back[ed]

expectations,' 'economically viable use' or 'ripeness' are not justiciable in this case." (City opp., p. 10)

Really? Why not? It seems to LBE that one cannot properly conclude that either the ordinance does not preclude development or that annexation into the City might afford relief without determining what LBE's expectations were, what uses are permitted of the property by the City and whether they are economically viable, as well as what steps have already been taken (and what non-futile ones remain) to ripen the case.

Thus, the discussion at page 10 of the City's brief accurately pinpoints much of the dispute before this Court: the City believes that its actions ought to be rubber-stamped "approved" without examination of their impacts or consequences, while LBE believes that this Court meant it's repeatedly expressed concern for economic viability, investment-backed expectations, and protection of the rights of heavily regulated property owners.

How to effectuate this Court's intended protections is subject to such diverse treatment in the lower courts that further guidance is needed now from this Court to end the anarchic conditions prevailing. Further delay will result only in more chaos, not resolution.

SUBSTANTIVE DUE PROCESS IS NOT A WORD GAME

The City's approach to substantive due process appears to be that if any rationale can be conjured for its actions, then its actions are valid. (City opp., p. 15)

That comports neither with the cases discussed in LBE's petition nor with this Court's interest in the issue as exemplified by *PFZ Properties, Inc. v. Rodriguez, cert. granted*, no. 91-122.

LBE challenged the rationale for the City's restriction of development of its property because, as part of its extensive dealings with both the City and the County to develop its property in a manner which was both sensitive and responsive to the city/county needs, LBE had arranged for the construction of infrastructure and utilities through neighboring projects which were adequate to service the LBE property without placing any burden on City or County facilities.

Thus, a hearing was needed to determine the validity of the City's assertions that it needed to choke off development to provide for the provision of adequate services and to account for traffic and air quality.

The City, however, doesn't want to subject its actions to scrutiny. Small wonder. The City has no defense, other than the procedural defense provided by the California courts when they accepted the City's assertions at face value and refused to examine their underpinnings.

THE IDEA OF "REASONABLE, INVESTMENT-BACKED EXPECTATIONS" FOUND IN THE CITY AND COUNTY BRIEFS ROBS THE CONCEPT OF ANY MEANING

The multiple reliances by this Court on the concept of reasonable, investment-backed expectations have been discussed in the Petition. As noted there, both this Court's repeated explications and its reference to the right of a property owner to be able to attempt to achieve a profit, or reasonable return, on its investment show that the concept is an important element of takings law.

The City and County dispute that. They would relegate the concept to the old, state law concept of "vested rights." (County opp., pp. 21-26; City opp., p. 21)

There are at least two responses.

First, had this Court intended to say "vested rights," it could have done so. In any or all of the cases decided during the last decade and a half. It did not. Presumably, that was because the baggage carried by the old "vested rights" concept was not what this Court had in mind.

Second, the two concepts are not equivalent. The concept of examining a property owner's expectations did not appear in any land use cases (state or federal) until this Court's 1978 decision in *Penn Central.* The expectations concept in takings law is based on the property owner's reasonable beliefs and actions. The 9th Circuit Court of Appeals recently contrasted the two ideas:

> "In contrast to a taking or deprivation claim, the gravamen of a 'vested rights' claim is that the landowner has a right to a particular use of his land because he has relied to his detriment on a formal government promise (in the form of a permit) stating that he can develop that use. The claim is thus a species of governmental estoppel. A claim of estoppel against the government rests not on Constitutional norms of fairness but on broader norms of equity." (*Lakeview Dev. Corp. v. City of South Lake Tahoe* [9th Cir. 1990] 915 F.2d 1290, 1295 [citation omitted])

Thus, by the clever prestidigitation of equating LBE's expectations claim to a "vested rights" claim (when no vested rights claim was presented below) the City and County have evaded the issue in a manner which eliminates protection this Court insisted on creating.

Whether this Court's expectations concept is to be equated to the older vested rights concept, as the

California courts did below, is a matter of serious moment, warranting this Court's attention before the virus spreads further.

"RIPENESS" SHOULD NOT BE A GAME EITHER

The City's suggestion that "[r]ipeness is not a game . . ." (City opp., p. 12) is a proper desideratum. Sadly, reality doesn't come close. In land use cases, the concept of ripeness has been utilized by government agencies and numerous lower courts as a routine tool to shunt property owners out of court.

Property owners, attempting to abide by what the rules seem to be at any given moment, thus run the risk of either filing suit too early (as the courts below said occurred here) or, by seeking to "ripen" a dispute, too late (e.g., *National Advertising Co. v. City of Raleigh* [4th Cir. 1991] 947 F.2d 1158 [holding land use ordinance caused injury immediately upon passage and suit filed after later application of ordinance was untimely]).

In fields of the law other than land use, this Court has had no trouble in finding ripeness without forcing plaintiffs to jump through the kind of constantly changing hoops provided in land use cases. (See cases discussed at pp. 24 and 28 of the Petition and not mentioned by either the City or the County.)

If this Court is as interested in the protection of the rights of property owners as its recent decisions indicate, then a rational method of allowing litigation of their disputes with land use regulators seems mandatory. What exists now is local option anarchy, with lower courts able to find cases supporting virtually any result desired.

CONCLUSION

The City and County briefs attempt to cloud the serious legal issues at bench in a blizzard of "factual" assertions. They are in the wrong court. If they want to make factual arguments, the place to do that is at trial. The procedural avenue they consciously chose was a decison based on the allegations of the complaint.

The fundamental problem in regulatory taking cases, which remains even after the numerous decisions this Court has rendered recently, is how to get a case tried on its merits. To date, many lower courts are accepting the tortured arguements of entities like the City and County at bench, and inventing ever more clever ruses to preclude factual adjudication.

Because LBE believes that this Court intends for the Fifth Amendment to provide protection to property owners, LBE prays that certiorari be granted.

Respectfully submitted,

PAUL R. HAMILTON
Counsel of Record
and
KAREN J. LEE
of HAMILTON & SAMUELS

MICHAEL M. BERGER
of BERGER & NORTON

Attorneys for Petitioner
LONG BEACH EQUITIES, INC.